Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO.

In The SUPREME COURT OF THE UNITED STATES

CURTIS R. WILBURN
Plaintiff and Appellant

v.

KAISER PERMANENTE MEDICAL GROUP, Inc.; KAISER FOUNDATION HOSPITAL; KAISER FOUNDATION HEALTH PLAN, INC.; LAURENCE ARIYASU, M.D.;
Defendants and Respondents

On Petition for Writ of Certiorari to the Supreme Court of California, Court of Appeal, Third Appellate District

PETITION FOR WRIT CERTIORARI

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81pp

QUESTIONS PRESENTED

NUMBER 1

Whether when Curtis Wilburn, plaintiff, received the August 29, 2000 arbitration ruling on Motion to Dismiss, granted to Defendants, after which on August 30, 2000 by telephone to Maureen Newcomer and Judith Anderson, attorneys for defendants, informed them that Plaintiff will seek an appeal. Whether when Judith Anderson's questions and statement, " Why are you making an appeal? We have fixed it so that you can get Attorney John Roman! What more do you want?" Was there a conflict of interest in the reference to the above statements when defendant's attorney tried to fix the legal malpractice case in order to be in a better position for the medical malpractice case?

NUMBER 2

Whether the January 1, 1977 contract between Kaiser Foundation Health Plan, Inc., and the US. Civil Commission, then negotiating Agent for Group 2 of which Wilburn as a federal government employee was a member. Whether Article III section 3.5(A) disputes , is applicable to Curtis Wilburn, Plaintiff?

Questions Presented cont'd

Number 3

Whether the Sacramento County Superior and Municipal Courts, Arbitration Unit (Case No. 98ASO5525) Judge Benjamin Diaz presiding is a court of competent jurisdiction in accordance to the January 1977 contract Article III Section 3.5. [A] disputes?

NUMBER 4

Whether the Honorable Benjamin Diaz's comments.(It does appear that there have been an implied waiver of the five year statute) is in accordance with the January 1977 Article III Section 3.5 (A) disputes?

NUMBER 5

Whether the letter on November 3, 1997 from Wiley to Wilburn is false information, harmful to Wilburn and caused him to lose his April 3, 2000 "D" (Case No. 98AS05525) lawsuit against Attorney John Roman?

Questions Presented cont'd

NUMBER 6

Whether for the August 19, 2000 continuance of the motion to dismiss, did someone from the full Arbitration Panel or Judith Anderson, Attorney for Defendants, informed Attorney John Roman of the date, time, and location of the hearing for the continuance knowing that Curtis Wilburn, Plaintiff was fearful for his life?

NUMBER 7

Whether after the "objections from Judith Anderson, which was overruled by Judge Lloyd Phillips, the full Arbitration Panel and Ms. Anderson did listen to two (2) tapes of Plaintiff's Expert Witness, Dr. Ernest Johnson and Plaintiff asked, Judge Lloyd Phillips, buy listening to the two (2) tapes, "will this help or hurt my case?" Judge Phillips answered, "It would be a great help to your case, but it will never get there to be used."

C.T. pp 38, lines (14-38

C.T. pp 39, lines (1-14)

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U.S. Supreme Court:

United States v. Miller, C.A. Mass., 43 F. 2D 600, 602 Conflict of Interest

Gardner v. Nashville Housing, Authority of Metropolitan Government of Nashville and Davison County Tenn., C.A. Tenn., 514 F 2D 38, 41 Conflict of Interest

STATE Cases:

Boutwell v. Kaiser Foundation Health Plan 206 CAL. APP. 3D. 1371[24 CAL. RPTR. 173] (1988) Decision

Brock v. Kaiser Foundation Hospital 10 CAL. APP. 4th 1790; [13 CAL RPTR 2 D 678]

Lockhart/Mummery v. Kaiser Foundation Hospitals, Supra 103 CAL. APP. 3D 891 [1980] Decision

Mid-Wilshire Associates v. Winifred K. O'Leary, 7th CAL. APP. 4th 140; [July 1992]

Com. Vs. Eernandez, 333 PA. Super. 279, 482 A. 2D 57, 569. Testimonial Evidence

OPINIONS BELOW

Opinions by Sparks, J., with Puglia, P.J., and Sims, J., Concurring. In case [No. C011372. Third District. Nov. 20, 1992 Michael G. Brock ET AL. Plaintiffs and Appellants v. Kaiser Foundation Hospitals ET. AL., Defendants and Respondents. Note: Summary Located: Filed April 30, 2001 Petition for Review (Page 52). And table of authorities page vi.

March 6, 1992 – Recorded Meeting. "Expert Witness Dr. Ernest Johnson". Located: C.T. Page 120, Lines (23-27), C.T. Page 121 through 126, and Page 127, Lines (1-22).

October 16,199?? – Transcript of "Interview Expert Witness Dr. Ernest Johnson". Located: C.T. Page 120, Lines (23-27, C.T. Page 121 through page 126 and C.T. Page 127,Lines (1-22)

Sacramento Superior and Municipal Courts – Arbitration Unit Wilburn v. Roman, Case No. 98SO5525. Hon. Benjamin A. Diaz, (55) Five Comments: Located: Filed April 20, 2001. Case No. 00CS01355 Index Table of Contents "D"

JURISDICTION

August 29, 2000 – *Arbitrators' Ruling on Motion to Dismiss.* Located: Filed April 20, 2001. Case No. 00CS011355 Index Table of Contents "R".

November 17, 2000 – Superior Court of California. Judge John R. Lewis Dept. 53, Petition to Vacate Arbitration Award Tentative Ruling. *Petition Denied.* Located: Filed April20, 2001. Case No. 00CS01355 Index Table of Contents "A-5".

March 22, 2001 – court of Appeal of the State of California. By the Court: The Appeal filed on December 26, 2000 *is Dismissed as from a non-Appealable Order.* Located: Filed April 30, 2001, Supreme Court of the State of California. Case No. 00CS01355. Petition for Review, Page IV.

June 27, 2001 – In the Supreme Court of California *Petition for Review denied.*

July 9, 2001 – Court of Appeal of the State of California Third Appellate District. Case N. C037221, Sacramento Superior Court No. 00CS01355. Respondents to *recover costs of Appeal.*

Jurisdiction cont'd

Superior Court of the State of California in and for the County of Sacramento, 720 Ninth Street, Sacramento, CA 95814, Case No. 00CS01355 and Case No 98AS05525, Located: Filed April 20, 2001. Case No. 00CS01355. Index Table of Contents "C".

Sacramento Superior and Municipal Courts – Arbitration Unit, 720 Ninth Street, Room 102, Sacramento, CA 95815, Case No. 98AS05525, Located Filed April 20, 2001. Case No. 00CS01355. Index Table of Contents "D".

January 1, 1977, Contract between Kaiser Foundation Health Plan, Inc., and the United States Civil Service Commission (then the Negotiating agent for Group 2) of which Wilburn was a Federal Government Employee and a member. Located: Filed April 20, 2001. Case No. 00CS01355. Index Table of Contents "A".

CONSTITUTIONAL PROVISIONS INVOLVED

The following Constitutional provisions are involved in this case

The Fourteenth Amendment

Section1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they resided. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law: Nor deny any person within its jurisdiction the equal protection of the laws U.S. Constitution Amendment XIV Section 1.

CODES AND RULES INVOLVED

1. 13 U.S.C. Section 532 (1)
2. 14 U.S.C. Section 532 (A)(C)(H)(I)(G)(ii)(iii)
3. 28 U.S.C. Section 2403 (B)
4. 29 U.S.C. Section 542 (4) (C) (5)
5. 33 U.S.C Section 544 (C) (D) (I) (2) (B)
6. Federal Evidence Rule 401

Statement Under Rule 29.4 (B)

"Since the proceeding draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 28 U.S.C. Section 171, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. Section 2403 (A) may be applicable.

"No court of the United States as defined by 28 U.S.C. Section 451 has, pursuant to 28 U.S.C. Section 2403 (A), certified to the Attorney General the fact that the Constitutionality of such Act of Congress has been drawn in question.

[1]Subsection (a) of §2403 provides that in any action in a court of the United States to which the United States or any agency, officer, or employee thereof is not a party, "wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, shall permit the United States to intervene for presentation of evidence, if evidence

is otherwise admissible in the case, and for argument on the question of constitutionality.

Copies of the received: April 18, 2001 – Petition for rehearing "Unfair Competition case. See. Bus. and Prof. Code Section 17209 and Cal. Rules of Court. Rule 16 (D)". In the Court of Appeal of the State of California in and for the Third Appellate District. Case No. C037221. Proof of Service and copies were mailed to: State Attorney General, Bill Lockyer; District Attorney, Jan Scully and defendants

Filed April 30, 2001 – Petition for Review after the published decision of the Third

Statement Under Rule 29.4 (B) cont'd

Court of Appellate District, affirming the judgment. In the Supreme Court of the State of California. "(Unfair Competition Case)". See Bus. and Prof. Code Section 17209 and Cal. Rules of Court, Rule 16 (D), Case No. 00CS01355. Proof of Service and Copies were mailed to: State Attorney General, Bill Lockyer, and District Attorney, Jan Scully, and Defendants.

STATEMENT OF THE CASE

I. MATERIAL FACTS

"(Plaintiff by telecommunication to Ms. Judith Anderson and Ms. Maureen Newcomer, and informed both respondents, that the plaintiff will seek an appeal!

When the plaintiff was talking with Ms. Judith Anderson, she asked the plaintiff, why are you making an appeal? We have fixed it so you can get Attorney John Roman! What more do you want? 1 C.T. pp. 39, lines (18-28) and C.T. pp. 40, lines (1). [106]

PLAINTIFF PRODUCED AS EVIDENCE THREE DOCUMENTS:

- The April 3, 2000 "D" – Award of Arbitrator.
- The September 7, 200 "F" – Notice to appear at trial and to produce-document and things.
- The October 11, 200 "C-C" – conditional dismissal.

---

[106] "C.T." Herein means Clerk's transcript on appeal; "R.T. means Reporters transcript of proceedings.

The above three documents are the Plaintiff's allegations as evidence of constitutional violation of:

- Testimonial or communicative evidence or evident mistake.
- Conflict of interest
- Preponderance of evidence
- Relevant evidence
- Infringement or infraction

The April 3, 2000 "D" – Award of Arbitrator. "Denied plaintiff's claim and awarded in full and final claim submitted to arbitration, costs are awarded to defendants per cost bill".

The September 7, 2000 "F" – Notice to appear at trial and to produce documents and things. John Roman gives notice to the plaintiff Curtis Wilburn to bring with him each and every statement from any bank, credit union or other financial institution, or deposits of any funds, from social security, SSI, private or U.S. Government retirement or disability monies, etc. from January 1991 through

September 2000. The above September 7, 2000 "F", reflects Attorney John Roman is clearly pursuing the awards in full.

The October 11, 2000 "C-C" – Conditions dismissal, conditional settlement. This document is clearly evidence that Attorney John Roman changed and offered a settlement of twenty thousand dollars ($20,000), which the plaintiff Curtis Wilburn agreed and excepted as conditional settlement. The plaintiff alleges that the defendants somehow convinced Attorney John Roman to drop the arbitration award, that he had won in the Sacramento Superior and Municipal Courts – Arbitration Unit – Case N. 98AS05525. After Ms. Judith Anderson's statement, *"Why are you appealing? We have fixed it so that you can get Attorney John Roman! What more do you want?"*

II. FEDERAL QUESTIONS RAISED IN LOWER COURTS.

Plaintiff raised the Federal questions stated herein at all stages

after the August 29, 2000 "R" Arbitrator's ruling of Motion to Dismiss. Granted to Defendants.

- Filed November 2, 2000 – Memorandum of Points and Authorities in support of Petitioner's Petition to vacate Arbitration award and for rehearing. (C.T. pp. 39 lines 15-28 and C.T. pp. 40 Line (1)
- Tentative ruling – Superior Court of California November 17, 2000 – The courts' tentative ruling: ("There is nothing in the petition and supporting points and authorities showing grounds for settling aside the Arbitrator's decision und CCP 1286.2. – Memorandum of Points, has all of the complaints and violations, that are listed in this "Petition for Writ of Certiorari". Listed numerically by page numbers:

A. "Dr. Ernest Johnson Plaintiff's expert witness opinions of the surgical procedures on the plaintiff by Kaisers Dr. Laurence Ariyasu:

    - Listened to the (2) two tapes of Dr. Ernest Johnson: The March 1992 – recorded meeting.

- The October 16, 1996 transcript of interview with Dr. Ernest Johnson.
- Petitioner asked Judge Lloyd Phillips, did this help or hurt the petitioner's case? Judge Lloyd Phillips answered, "I think it would be a great help to your case, but it will never get there to be used!"

B. The January 1, 1977 contract between Kaiser and the U.S. Civil Service Commission: Article III, Section 3.5 (A) disputes:

- Whether the above-mentioned contract was applicable to the plaintiff?
- Whether the Superior and Municipal Courts-Arbitration Unit, the April 3, 2000 Case No. 98AS05525; is a court of competent jurisdiction" and in accord with the above mentioned January 1, 1977 contract, Article III Section 3.5 (A) disputes the Honorable Benjamin Diaz comments
    - The Written (3) documents defer request, constitute an implied waiver of the five year statue of limitations:

- December 5, 1990 "M"
- December 10, 1990 "O"
- October 3, 1994 "T-T".

- The November 3, 1997 – Letter from Kaiser's Ms. Jamie Wiley to Curtis Wilburn. Provided by Kaiser was false information; that the case closed on October 17, 1997. And the harm caused by this letter.

- Whether the statement and the questions made by Ms. Anderson, ("Why are you making an appeal? We have fixed it so that you can get Attorney John Roman! What more do you want?) C.T. pp (29-41)

- The filed January 11, 2001 – second amended Notice of Appeal. Plaintiff hereby appeals from:

- November 17, 2000 – Tentative and court ruling
- November 1, 2000 Memorandum of Points and Authorities in support of Petitioners Petition to vacate arbitration award and for rehearing. C.T. pp (118-135)

C. Filed March 22, 2001 – Dismissal order filed by the court.
On the court's own Motion, the appeal filed on December 26, 2000, is dismissed as from a non-appealable order. (See California Code of Civil Procedure Section 1294), and Mid-Wilshire v. O'Leary (1992) 7 Cal. App 4th 1450, 1455.

SUMMARY OF 2ND PARAGRAPH

[The court also declined to construe the trial court's response to the Lessee's petition as a "dismissal" rather than a "denial", since Code of Civil Procedure, Section 1294, Sub division (B), plainly provides for an appeal from an order "dismissing"

such petitions, but makes no similar provision for "denials". Finally, the court also declined to assume jurisdiction by treating the appeal as a Petition for Writ of Mandate, since the Lessee had not expressly requested the court to do so, and the Lessee had an adequate remedy in the direct appeal from the judgment] (Opinion by Grignon, J., with Turner, P.J., and Ashby, J., concurring)

D. Filed April 20, 2001 – Appellant's petition is denied. Sims, Acting P.J. – No reasons or comments

E. Filed April 30, 2001 – Petition for review after the published decision of the Court of Appeal, Third Appellate District, affirming the judgment

Petition for denied. Werdegar, J., Did not participate ("No reasons or comments")

By cumulative prejudice, plaintiff was prejudiced by the error or errors upon which plaintiff relies for reversal or modification of the judgment or order from which the appeal is taken

During the July 29, 2000 hearing for the motion to dismiss and the August 19, 2000 – continuance Kaiser's Ms. Judith Anderson misled and misdirected the full arbitration panel, by citing and relying upon two cases. Ms. Anderson cited and relied on the cases twelve times during the hearing. The two cases are not applicable in this case of Wilburn v. Kaiser.

See this ("Petition for Writ of Certiorari"), reasons for granting the petitition pp (15 through 24).

This caused error of cumulative prejudice in the decisions

- August 29, 2000 – Arbitrator's ruling on Motion to dismiss.
- November 17, 2000 – Tentative ruling.
- March 22, 2001 –The December 26, 2000 appeals is dismissed
- April 30, 2001 – Petition for Review – Denied.

REASONS FOR GRANTING THE PETITION

I. Curtis Wilburn Plaintiff", alleges that, "Ms. Judith Anderson", did as she stated: when she asked the question and made the state". "Why are you making an appeal? We have fixed it so that you can get Attorney John Ramon!" "What more do you want?"

II. **REASON FOR GRANTING THE PETITION**

Did Ms. Anderson lead and misdirect the court by the citied and relied upon case of Lockhart-Mummery v. Kaiser Foundation Hospital [1980] 103 Cal. App. 3rd 891?
Which is a [1980] decision, without and before the Stay Exclusion, the enactment of "Code of Civil Procedure Section 583.340" in the year [1984].
The enactment of "Code of Civil Procedure Section 583.340 in determining whether the prescribed five-year period has expired, time

during which it is impossible or impractical to proceed to trial is excluded. [Citation omitted] While the Stay order is in effect, it will be impossible or impracticable to proceed to trial. Therefore, a Stay is ordered. (IBID) The Stay exception was then separately codified (Section 583.340, subdivision (c). Ms. Anderson used the above Lockhart-Mummery by citing the [1980] decision twelve times on August 29, 2000 – Arbitrator's ruling on Motion to Dismiss. The twelve times located by page and line number:

pp. 1 lines (2-28
pp. 2 lines (1-2); (3-10)
pp. 5 lines (23-25)
pp. 6 lines (3-5); (10-16); (25-27)
pp. 7 lines (25-28)
pp. 8 lines (7-15)
pp. 9 lines (13-16)

Located: filed April 20, 2001 – Case No. 00CS01355 Index Table of Contents "R" pp (1-10)

Ms. Anderson, led and misdirected the court by the cited and relied upon case of Boutwell v. Kaiser

Foundation Health Plan, 206 Cal. App 3D 1371; Cal. Rptr. 173 [1988] decision. ("Code Civil Procedure Section 583.310")

SUMMARY

The trial court entered an order dismissing plaintiff's Medical Malpractice Complaint for failure to bring it to trial within the mandatory five-year period under Code Civil Procedure Section 583.~~310~~. (Superior Court of the City and County of San Francisco No. 774961, Lucy K. McCabe, Judge.

Note: The above Boutwell v. Kaiser the [1988] decision

- The alleged tort occurred in 1982, and the trial court dismissed under (Code of Civil Procedure Section 583.310). Therefore, this case is not applicable to the case of Wilburn v. Kaiser, but a similar medical malpractice case!
- Plaintiff Curtis Wilburn cited and relied upon Brock v. Kaiser Foundation Hospital,

10 Cal. App. 4th 1790; 13 Cal. Rptr. 2D 678 [November 1992] decision.

SUMMARY 2ND PARAGRAPH

The Court of Appeal reversed holding that the trial court erred in dismissing the action for delay in prosecution, since the legal action was stayed during such proceedings and the time during the Stay should have been excluded for purposes of computing the five-year period. The court also held that application of the exclusion (Code Civil Procedure Section 583.340, Subdivision (B) did not depend on the reasonable diligence of plaintiff's in the related Arbitration proceedings. The Stay of proceeding stays the five-year period until conclusion of the Arbitration proceedings. The court further held that the trial court lacked authority to dismiss the Arbitration proceedings for plaintiff's alleged failure to pursue Arbitration with reasonable diligence, or the basis of its dismissal of the underlying action at law for failure to bring it to trial within five years. (Opinion by

Sparks, J., with Puglia, P.J., and Sims, J., Concurring)

Located: Filed April 30, 2001 – Supreme Court of the State of California. Case N. 00CS01355. Petition for Review – Table of Authorities Page ??? Copy of summary on page (52).

III. **IMPLIED WAIVER OF THE FIVE-YEAR STATUE OF LIMITATIONS**

April 3, 2000 Superior and Municipal Courts Arbitration Unit, Case No. 98AS05525 Hon. Benjamin A. Diaz award to Arbitrator. Judge Benjamin A. Diaz comments:

> Five () references to this petition for Writ of Certiorari, question presented, page ii Judge Diaz comments:
>
> Under the circumstance presented at this hearing, it does appear that there may be an implied waiver of the five-year statue, which should have been litigated in front o Judge Lloyd Phillips.

Three letters on defers:

The word defer is an English word meaning implies a deliberate putting off to a later time.

- Stay – suggest the stopping or checking by an intervening agency or authority
- Suspend – implies temporary stoppage with an added suggestion of waiting until some condition is satisfied.
- Postpone – implies an intentional deferring to a definite time: ("Webster's Ninth New Collegiate Dictionary")

December 5, 1990 – Moffitt letter Davenport – Re: Defer

December 10, 1990 – Davenport letter Mofitt.

October 3, 1994 – Faires letter Roman. We have previously agreed to defer this procedural step.

Located: No. 3 in this Petition for a Writ of Certiorari – questions presented page (???) for (1) implied waiver and (2) defers. For copies of all the above filed April 20, 2001 Case No. 00CS01355 – index table of contents "M", "O", "T-T" and "D".

I V. The November 3, 1997 Jamie Wiley letter to Wilburn. According to Margaret Montgomery (Medical Legal Secretary for Vallejo; Ann Sparkman Head of Legal Department) states the case was closed. According to Ms. Montgomery the case was closed on October 17, 1997 due to non pursuant within the five (5) year limitations.

This was a very harmful letter:

- Plaintiff dismissed Attorney Roman, after this letter.
- Plaintiff lawsuit against Mr. Roman
- Attorney Roman won the Arbitration award because the case was not closed.
- No other attorney would take the case
- This letter was a misrepresentation of the facts, and false information.

Located: November 3, 1997 letter in this petition for a Writ of Certiorari – question present No. 2.
April 3, 2000 Judge Diaz comments No. 2, 3, 4, and 5. For copy of letter filed April 20, 2001, Case No.

00CS01355, Index Table of Contents "H".

V. During the November 17, 2000 Petition to Vacate Arbitration award hearing in Superior Court Case No. 00CS01355, Department 53, Judge R. Lewis

Questions asked by the court and answered by Judith Anderson:

The Court: Ms. Anderson, you will have noted that the court cited to and relied upon Brock v. Kaiser Foundation, 1992 decision in its tentative decision hers. Is there any reason why that case was not cited by your side?

Ms. Anderson: No.

The Court: Are you familiar with the Brock case?

Ms. Anderson: Yes

(R.T. pp 8 lines 16-23)

The Court: Do you agree with the court that the Brock case is

applicable in the factual setting before it?

Ms. Anderson: Explain to me what you are saying.

The Court: The court has relied upon Brock v. Kaiser Foundation. It happens that Kaiser Foundation was the defendant in that action.

Ms. Anderson: Correct.

(R.T. pp. 8 lines 24-28 and R.T. pp. 9, lines 1-3)

The Court: As well it was not cited by Kaiser in this pending Motion. I am concerned as to whether there is something about the case that the court may have missed in its reliance upon it, given that Kaiser did not cite it.

Ms. Anderson: I would like to do some research on that and respond.

(R.T. page 9, lines 4-13)

The Court: Okay. You're comfortable that the court is not

being allowed itself to be misdirected in relying upon it?

Ms. Anderson: Correct.

Ms. Anderson misled and misdirected the Court by:

Ms. Anderson: Your Honor, may I approach you with this order?

The Court: Let Mr. Wilburn see it and then give it to the court attendant, please.

Ms. Anderson: Thank you. After which Ms. Anderson handed a "blank proposed order, the second page that was written in red ink, she handed this one sheet or page to plaintiff, which was a second page of the proposed order, plaintiff reluctantly signed in court.

Allegation: Plaintiff alleges that Ms. Judith Anderson misled and misdirected the court in the act above

(R.T. pp 10 lines 22-26)

Allegation: Ms. Anderson's statement, "we have fixed it so that you can get Attorney John Roman. What more do you want?"

(R.T. pp 9 lines 210-28 and R.T. pp 10 lines 1-19)

Located: November 17, 2000 Reporter's Transcript of Proceedings. R.T. and Clerks' transcript on Appeal.

(C.T. pp 63-64)

CONCLUSION

The reason for granting this petition are discussed in

- Reasons for Granting the Petition
- Questions presented
- Constitution provision involved
- Statement under Rule 29.4 (B)
- Statement of the Case
- Table of Authorities

Curtis R. Wilburn, Plaintiff, respectfully request this court to consider this petition for Writ of Certiorari

Dated September 24, 2001

RESPECTFULLY
SUMBITTED

Curtis R. Wilburn

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APPENDIX 1

In The
Sacramento Superior & Municipal Courts –
Arbitration Unit

Case No. 98AS05525

CUTRIS E. WILBURN, Plaintiff

Vs.

JOHN J. ROMAN, ET AL, Defendant

AWARD OF ARBITRATOR

OPINION

The undersigned arbitrator, have been duly sworn and having heard the cause and the matter being deemed submitted on March 30, 2000, awards in full and final settlement of all claims submitted to arbitration as follows:

- Plaintiff's claim denied.
- Costs are awarded to defendants per cost bill
- Arbitrator's comments (see attached)

Background Facts

This litigation stems from allegations by plaintiff that defendants failed to timely prosecute his medical negligence case before the five-year statue expired. A copy of the original demand was not produced to the arbitrator, however, plaintiff's moving papers show that on December 10, 1990, Kaiser sent a letter to defendants acknowledging receipt of their claim and demand for arbitration of November 29, 1990 and that an attorney Steven Faires was assigned to the case to represent Kaiser. From a p0erusal of plaintiff's handwritten documents submitted to the arbitrator, it appears that the selection of party arbitrators began in the middle of 1993 with David Abbott was selected by plaintiff as his party arbitrator. Plaintiff also provides information of a letter sent by Mr. Faires to defendant Roman dated November 21, 1995 where Judge Lloyd Phillips (ret.) agreed to be the neutral arbitrator, and with Tom Minder as the respondent's party arbitrator. Ordinarily, absent any unusual circumstances, the five-year statue would have expired on or about November 29, 1996.

Plaintiff provides information of a letter dated June 19, 1997, from Mr. Faires to Judge Phillips of intent to seek dismissal for lack of prosecution and request of a hearing. A letter thereafter from Judge Phillips dated July, 1997, sets the arbitration hearing to begin October

29, 1997, with dates offered before that for hearing of respondents motions to dismiss. Later, a letter dated August 6, 1997, from Mr. Faires to Judge Phillips confirms September 13, 1997 as date for dismissal motion hearing and postponement of arbitration hearing until after such motion is heard. Thereafter Judge Phillips was informed by Mr. Faires that the date of September 13, 1997, was not confirmed by Roman. On October 13, 1997, Roman sends a letter to Mr. Faires which is copied to Judge Phillips attempting to coordinate hearing dates. On November 3, 1997, plaintiff is informed by Kaiser that they closed his file on October 17, 1997 for lack of prosecution. Plaintiff thereafter dismisses his Attorney Mr. Roman.

Under the circumstances presented at this hearing, it does appear that there may have been an issue of implied waiver of the five-year statue which should have been litigated in from of Judge Phillips. But the arbitrator has none of this information, save defendant's statement that there was no hearing. Without addressing the underlying medical negligence cause of action, plaintiff must still show at this hearing that the case was formally dismissed for lack of prosecution which he has failed to do.

Regarding, defendant Davenport who was an employee of Mr. Roman at the time Mr. Roman's office was engaged by plaintiff, Mr. Davenport offers evidence that he left that employ in December 14, 1990. Clearly there is no liability as to him under any circumstance.

APPENDIX 2

In The
Sacramento Superior & Municipal Courts –
Arbitration Unit

Case No.

CUTRIS E. WILBURN, Claimant

Vs.

KAISER FOUNDATION MEDICAL GROUP, et al.,
Respondents

ARBITRATORS' RULING ON MOTION TO DISMISS

OPINION

Respondent's motion to dismiss is GRANTED on the ground that Claimant has failed to prosecute this matter with reasonable diligence. Specifically, Claimant failed to bring the matter to hearing within five-years of the filing of his claim, which is the time limit provided by law.

BACKGROUND

Claimant's medical malpractice claim is subject to the provisions of a Group Health Benefits Contract dated January 1, 1977 between the United States Civil Service Commission and Kaiser Foundation Health Plan, Inc., Northern California Region. Section 1.10(3) of the contract provides: "A claim shall be waived and forever barred if...(2) the Claimant fails to pursue the arbitration claim in accordance with the procedure prescribed herein with reasonable diligence."

In Lockhart-Mummery v. Kaiser Foundation Hospital (1980) 103 Cal. App. 3rd 891, the Court of Appeal held that the time limits set forth in the Code of Civil Procedure for bringing a case to trial applied to arbitration under such a contract. Code of Civil Procedure section 583.310 states : "An action shall be brought to trial within five-years after the action is commenced against the defendant."

Claimant served his Notice of Claim and Demand for Arbitration on November, 29, 1990. This matter was not brought to trial within five years of that date. Pursuant to Code of Civil Procedure section 583.360, dismissal for failure to meet the five-year deadline is mandatory and that deadline is not

subject to extension, excuse or exception except as expressly provided by statue.

Code of Civil Procedure section 583.330 provides that the parties may extend the time within which an action must be brought to trial by written stipulation or an oral agreement made in open court. There is no evidence of such a stipulation or agreement in this matter.

Code of Civil Procedure section 583.340 provides that, in computing the time within which an action must be brought to trial, the time during which any of the following conditions existed shall be excluded: the jurisdiction of the court to try the action was suspended; prosecution or trial of the action was stayed or enjoined; or bringing the action to trial, for any other reason, was "impossible, impracticable, or futile".

There is no evidence that the jurisdiction of the court or the arbitrators to hear this matter suspended, or that prosecution or hearing of this matter was stayed or enjoined.

Moreover, the record submitted in connection wit this motion to dismiss demonstrates that there was no period during which bringing the action to

hearing was impossible, impracticable, or futile". At all times from the service of Claimant' Notice of Claim and Demand for Arbitration until the passing of the five-year deadline, it was within the power of Claimant and his counsel, John J. Roman, to bring this matter to hearing. Rather than this being a case in which it was impossible, impracticable, or futile" to bring this matter to hearing, this is a case in which Claimant and his counsel failed to exercise reasonable diligence to meet the statutory deadline.

A review of the history of this matter will demonstrate the failure to prosecute this matter with reasonable diligence. The facts do not appear to be disputed, and may be summarized as follows. Claimant's Notice of Claim and Demand for Arbitration was served on November 29, 1990. Section 1.10(2) of the Group Health Benefits Contract provided that the parties should select their "party arbitrators" within 30 days thereafter. On December 10, 1990, however, Roman contacted Marilyn Moffitt, counsel for Kaiser, and asked to defer the selection of party arbitrators for 90 days. Kaiser evidently agreed with this proposal and, on February 7, 1991, Kaiser's counsel,

now Steven R. Faires, wrote to Roman to suggest that selection of party arbitrators be held "in abeyance for the time being."

Neither Claimant no Roman appears to have taken any steps to move the matter forward to hearing during 1991. The only documents on record from that year suggest that Claimant was dissatisfied with the services Roman was providing, and actually may have discharged him for some period. By May 14, 1992, however, Claimant evidently had worked out this dispute with Roman, and Roman had propounded some discovery to Kaiser. In July 1992, Roman wrote Faires to discuss the appointment of a neutral arbitrator and the scheduling of a hearing date. In November and December of 1992, Roman attempted to set several depositions.

No further activity is apparent on the record until June 4, 1993, when Roman wrote to Kaiser to state that he had designated his party arbitrator and to ask Kaiser to designate its arbitrator. The parties exchanged some correspondence regarding the case during the remainder of 1993, including a letter from Faires to roman on August 6 asking Roman to call him about

moving the matter forward, but Roman seems to have made no effort to do so.

Very little activity seems to have taken place during 1994. On April 1, Roman wrote to Faires designating a new party arbitrator. Nothing more seems to have occurred until October 2, 1994, when Faires wrote to Roman stating, among other things: *"If your client wishes to proceed with arbitration, the next step is to appoint party arbitrators. We have previously agreed to defer this procedural step. If you desire to appoint party arbitrators at this time, please let me know, and we will be happy to comply. Unless I hear from you, I will assume that you wish to take no further action at this time."*

Despite this invitation to proceed, there is no evidence that Roman did anything to move the case forward until September 20, 1995, when he (again) wrote to Faires to designate his arbitrator and ask that Kaiser designate its arbitrator immediately. On September 22, 1995, Faires wrote to Roman designating Kaiser's arbitrator.

It is not immediately apparent from the record what happened next. Evidently there was some difficulty in appointing the neutral arbitrator. The next document in the record is a letter from

Faires to Roman dated November 14, 1995 offering to work with Roman directly to select the neutral arbitrator. Roman accepted the offer. ON November 17, 1995, Faires wrote to Roman to accept the proposed neutral arbitrator and to name a new party arbitrator on Kaiser's behalf.

As of this date, with the five-year deadline fast approaching, neither Claimant nor Roman evidently had made any efforts to set or notice a hearing.

ON November 21, 1995, with the deadline just one week away Roman apparently telephoned Faires to confirm appointment of the neutral arbitrator and to ask Faires to agree to appear at a brief hearing on November 28, 1995, at which the arbitration would commence with the swearing of a witness and brief testimony from plaintiff, then be adjourned to a later date. The purpose of the hearing appears to have been simply to commence the arbitration hearing before the running of the five-year deadline. Faires refused to participate in the hearing, stating that he had not been given the notice of hearing required by law and that the proposed location of the hearing, in Sacramento County, violated the venue provisions in the arbitration contract.

Despite Faires' refusal to participate, there is no evidence that Roman made any effort to obtain a court order to compel Kaiser to participate in the hearing prior to the expiration of the five-year deadline on November 29, 1995. Accordingly, no hearing was held prior to the five-year deadline. There is no evidence that Claimant or Roman took any steps to obtain court intervention after November 29, 1995 either.

Neither Claimant nor Roman took any further steps to set the matter for hearing until February 1997, when Roman wrote to the neutral arbitrator attempting to set a date for hearing. During 1997, some attempts were made to schedule the matter, but Kaiser consistently took the position that it would appear only in order to make a motion to dismiss pursuant to the five-year statue. At that point, the matter dropped for reasons not germane to this ruling, and it was not reset until this year.

As this summary of events demonstrates, there was no period between service of the Notice of Claim and Demand for Arbitration and the running of the five-year deadline in which Claimant or his counsel could not have set the matter for hearing. No

reason or excuse is apparent on the record for their failure to do so.

Claimant argues that there was an implied waiver of the five-year deadline based on Kaiser's early request to defer selection of party arbitrators and subsequent additional delays in designating arbitrators that Claimant also attributes to Kaiser. Certainly, the record demonstrates that Kaiser requested certain delays and generally did not aggressively push the matter forward. Nevertheless, Kaiser's delay does not constitute a waiver of the five-year deadline, implied or otherwise. Nor does that delay excuse Claimant from his obligation to bring the matter to hearing in a timely manner. As the Court of Appeal stated in Boutwell v. Kaiser Foundation Health Plan (1988) 206 Cal. App. 3rd 1371, 1374: "Plaintiff cannot sit back while defendant delays, since the plaintiff has an 'arsenal of weapons' to prevent defendant's dilatory actions. [Citation omitted.] In the arbitration context, a plaintiff may petition the superior court to assist (him) in expediting the proceedings by moving to appoint a neutral arbitrator 9or) moving to set an arbitration date." Claimant failed to use any of those "weapons" here. And although Roman

attempted to set a hearing at virtually the last possible moment, he failed to follow through adequately in the face of Faires' refusal to attend. As the Boutwell Court stated, with particular significance to this matter: "Plaintiff also could have moved to set the arbitration date in a more timely fashion instead of attempting to schedule the hearing only days before the statutory period would run." Id., 206 Cal. App. 3rd at 1374.

Claimant has not demonstrated that it was impossible, impracticable or futile to bring the matter to hearing within five-years of its commencement. Claimant has not established an implied waiver of the five-year statutory deadline. Accordingly, the matter is subject to mandatory dismissal pursuant to Code of Civil Procedure sections 583.310 and 583.360

Alternatively, this matter is subject to dismissal pursuant to section 1.10 (3) of the Group Health Benefits Contract on the ground that Claimant has not pursued his claim with reasonable diligence. Even after the passing of the five-year deadline, Claimant and his counsel mad no more than token efforts to bring this matter to hearing until this year. Nearly five-years have elapsed since the passing of the statutory

deadline, and nearly ten years since the service of the Notice of Claim and Demand for Arbitration. Claimant and his counsel have not exercised reasonable diligence in letting this matter languish for such a long time.

Claimant contends that he is entitled to relief from mandatory dismissal on the basis of a "fraudulent act" allegedly committed by Kaiser. The alleged fraudulent act occurred when Kaiser representative informed him in November 1997 that his claim had been closed one month earlier as the result of the expiration of the five-year limit. In fact, the file had not been closed at that time.

Claimant has not established grounds from relief from dismissal. Claimant evidently relies on section 3.5 of the Group Health Benefits Contract. That section has no application to arbitration of claims involving the provision of medical services. It appears in an article of the contract entitled "Subscription Charges and Accounting", and pertains to disputes between the United States Civil Service Commission and Kaiser regarding those issues. It provides for limited judicial review of decisions of the Armed Services Board of Contract Appeals on disputes arising under that

article, and thus provides no authority for avoiding mandatory dismissal of a claim involving the provision of medical services under the circumstances presented here.

Moreover, the record does not support the contention that Kaiser committed a fraudulent act. The statement that Claimant's file had been closed appears to have been nothing more than an error without any fraudulent intent. Since that statement was made in November 1997, nearly two years after the expiration of the five-year deadline, it cannot in any event have been the cause of Claimant's failure to bring the matter to hearing within the required time.

For the reasons stated above, the motion is GRANTED and the claim is ordered DISMISSED.

APPENDIX 3

In The
Superior Court of California
County of Sacramento

Case No. 00CS01355

CUTRIS E. WILBURN, Plaintiff

Vs.

KAISER FOUNDATION MEDICAL GROUP, et al

PETITION TO VACATE ARB AWARD

OPINION

Tentative Ruling

BACKGROUND

This petition to vacate the arbitration award is based on "mistake, imperfect form, infringement, and infractions" and possibly fraud on the part of Kaiser based upon the alleged misrepresentation by Kaiser as to the closure of petitioner's case in 1997.

There is nothing in the petition and supporting points and authorities showing grounds for setting aside the arbitrator's decision under CCP 1286.2. The petition is DENIED.

Petitioner's claim for medical malpractice arose in 1990. Petitioner, and more particularly his attorney, delayed in bringing the matter to arbitration. ON June 15, 2000 respondent brought a motion to dismiss the proceeding which was granted. The arbitrators' decision documents the delay and related events, including petitioner's claim that Kaiser provided him with false information regarding his case. The Arbitrators' decision appears clearly within the law as articulated in Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, at 1808. Petitioner has not articulated any legally cognizable ground for vacating the decision.

Respondent shall submit a formal order.

COURT RULING

This matter argued by counsel and submitted. Court affirms tentative ruling.

APPENDIX 4

In The
Court of Appeal of the State of California
In and for the
Third Appellate District

Case No. 00CS01355

CUTRIS E. WILBURN, Plaintiff and Appellant

Vs.

KAISER FOUNDATION MEDICAL GROUP et al.,
Defendants and Respondents

Court's own Motion

DECISION

On the courts own motion, the appeal filed on December 26, 2000, is dismissed as from a non-appealable order. (See California Code of Civil Procedure section 1294, and Mid-Wilshre v. O'Leary (1992) 7 Cal. App. 4th 1450, 1455.)

APPENDIX 5

In The
Supreme Court of California
Court of Appeal, Third Appellate District
No. C037221

Case No. 98AS05525

CUTRIS WILBURN, Plaintiff and Appellant

Vs.

KAISER FOUNDATION MEDICAL GROUP,
Defendants and Respondents

PETITION FOR REVIEW

DECISION
Petition for review DENIED.

BACKGROUND

Procedure in connection with petitions for Certiorari

The preceding chapters indicate what cases can and should be taken to the Supreme Court, and whether the route is by way of certiorari or

appeal. This chapter describes the procedures in petitioning for certiorari. It applies to cases where certiorari is sought from state courts, the United States courts of appeals, the United States Court of Military Appeals, and the Supreme Court of Puerto Rico, except where variations for particular courts are noted. Chapter 6, moreover, discusses procedural matters that are common to both certiorari and appeal cases, while Chapter y emphasizes the procedures unique to cases that come to the Court from federal district courts by way of appeal. Chapter 8 is concerned with the procedures peculiar to *in forma pauperis* cases, which can come to the Court by way either of certiorari or of appeal.

6.1 Time Limitations in Petition for Certiorari

The first thing to be checked once it has been determined to file a petition for certiorari, is the time limit for filing the petition. That demands careful attention not only to the Rules that govern timely filing but to the calendar itself.

(a)

(b) *General Time Limits*

In virtually all cases, civil and criminal, the petition for certiorari must be filed within 90 days from the entry of the judgment below, or from the lower court's denial of a timely petition for rehearing, or from an order of a state court

6.33 *Services of Petition on Solicitor General in Certain Cases Involving Constitutionality of Federal Statutes*

In any proceeding in the Supreme Court wherein the constitutionality of an Act in Congress is drawn in question and neither the United States nor any agent thereof is a party, "the initial pleading, motion, or paper filed in this Court shall recite that 28 U.S.C. §2403 (a)[107] may be

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[107]Subsection (a) of §2403 provides that in any action in a court of the United States to which the United States or any agency, officer, or employee thereof is not a party, "wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for

applicable, and the document must be served upon the Solicitor Genera, Department of Justice, Washington, D.C. 2030," Rule 29.4(b).[108] And where such a private suit comes from a federal court, "the initial pleading, motion, or paper shall also state whether or not that court, pursuant to 28 U.S.C. §2403(a), has certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. "*Ibid. See Glidden Co. v. Zdanok*, 368 U.S. 814, 885 (1961)

Thus, where the petition for certiorari is the first paper filed in

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argument on the question of constitutionality.

[108] The predecessor to Rule 29.4 was adopted on June 20, 1960, 33 U.S. 859 , after the Court had heard oral argument in *International Association of Machinists v. Street* sand discovered that the United States had not been served and had not been notified that the constitutionality of a section of the Railway Labor Act had been drawn into question. 363 U.S. 825 (190). The *Street* case was set for reargument, following certification of the Attorney General as to the constitutional question and intervention by the United States. See 367 U.S. 740 (1961). The rule was promulgated to prevent a repetition of that situation

the Supreme Court in such a case, a section entitled Statement Under Rule 29.4(b) should be inserted just before the Statement of the Case and should read substantially as follows:

> "Since the proceeding draws into question the constitutionality of the Act of July 28, 193, 67 Stat. 226, 28 U.S.C. §171, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable."
>
> "No court of the United States as defined by 28 U.S.C.§451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question."

This paragraph need be used only in cases arising in federal courts; and if the lower federal court has in fact made a certification to the Attorney General the paragraph should be altered to reflect that fact.

The petition for certiorari must be served on the Solicitor General.

If the Court grants review of the case, it will simultaneously make the certification to the Attorney General, Subsequently, if the Solicitor General so requests and if the United States has not already intervened, the Court will permit the United States to intervene as a party in accordance with §2403(a). The same procedure is applicable where the first paper filed in the Supreme Court is a complaint in an original action or any kind of motion that in any way draws into question the constitutionality of a federal statute. A similar procedure is followed where the constitutionality of a state statute has been drawn in question, See §2403(b), discussed in Sec. .16, *supra*, and rule 29.4(c). In that event, the petition for certiorari should be served on the state attorney general.

6.34 *Additional Time for Filing Cross-Petition*

A cross-petition for certiorari is a petition filed after another party has already filed a petition in the same case. Although one

usually thinks of a cross-petition as opposing the position of the initial petitioner, the rules read literally do not contain any such limitation. Rule 12.4 says that "all parties other than petitioners shall be respondents," and Rule 12.3 permits "counsel for a respondent" to file a cross-petition. Such a petition must be filed if a respondent to the initial petition wished to overturn portions of the judgment below which are unfavorable. The cross-petition must be a separate document not combined with the brief in opposition to certiorari. Rule 12.3.

Prior to the 1980 revisions, the Supreme Court Rules made no mention of cross-petitions or cross-appeals. A second petition or appeal by any party was governed by the same rules and time limits as the initial petition or appeal. This created problems for a party who did not want to petition or appeal unless his opponent did, usually because he had prevailed on the point or

points most significant to him. He might not know until the last minute whether or not his opponent was going to seek Supreme Court review, and his own time to review would expire at the same time. IN order to be safe he might have to file before then, then move to dismiss his petition if his opponent did not file. This would waste both the lawyer's time and the client's money.

Most appellate courts had eliminated this problem by allowing other opposing parties additional time to file a cross-petition or cross-appeal. Federal Rule of Appellate Procedure 4(a)(3), which the Supreme Court had prescribed for the courts of appeals in 1967, allowed 14 days to cross-appeal. In 1980 the Court incorporated similar provisions in its own rules, but allowed 30 days after receipt of the initial petition. Rule 12.3. This additional time cannot be extended. Rule 12.3.

The cross-petitioner has the option of filing within the

time allowed for petitions generally, or with the additional time permitted after the initial petition. One important restriction is imposed on use of the latter alternative. Rule 13.5 provides that no cross-petition which would otherwise be out of time will be granted "unless a timely petition for a writ of certiorari of another party to the case is granted." This means that if a second petition wants the.....

APPENDIX 5

In The
Superior Court of California
In and for the County of Sacramento

Case No. 00CS01355

CUTRIS WILBURN, Plaintiff and Appellant

Vs.

KAISER PERMANENTE MEDICAL GROUP, INC.; KAISER FOUNDATION HOSPITAL; KAISER FOUNDATION HEALTH PLAN, INC.; LAURENCE ARIYASU, M.D.; AND THE LAW OFFICES OF ARCHER, McCOMAS, BRESLIN, McMAHAN, AND CHRITTON; AND STEVEN R. FAIRES, ESQ. AND JUDITH B. ANDERSON, ESQ., Defendants and Designee: Judith Anderson

2ND AMENDED NOTICE OF APPEAL

Opinion on Hearing

To the clerk of the above entitled court: notice is given that Curtis R. Wilburn[Appellant and Plaintiff} hereby appeals from the letter

November 17, 2000. Case No. 00CS01355. The tentative and court ruling. And the November 1, 2000 memorandum of points and authorities in support of petitioners petition to vacate arbitration award and for rehearing. Because from mistakes and negligence of not providing documents or letters to grounds for setting aside the Arbitrator's decision, Plaintiff's claim for medical mal-practice surgery, performed on March 15, 1990 according, to the January 13 1993 deposition of Laurence Ariyasu M. D., the surgery was done at Kaiser Hospital, Vallejo, California.

After the malpractice surgery on March 15, 1990., came imperfect form, evident mistakes, infringements, and infractions. The above allegations and claim were petitioned and denied herein on November 17, 2000 in favor of [Kaiser Defendant], the tentative or court ruling was against Curtis R. Wilburn [plaintiff and appellant], providing as follows: in the above mention petition. Petitioner did not show grounds for setting aside the

Arbitrator's decision under CCP 1286.2, the petition was denied. Set forth tentative ruling or court ruling, there of from negliegence and mistakes this appeal is made:

I. MEDICAL MALPRACTICE SURGERY

The orginal medical malpractice claim was served on Kaiser on November 29, 1990, As notice of claim and demand for Arbitration, amended on May 30, 2000. Amended Notice of claim and demand for arbitration and breach of medical duty, and fraud, Case No. 00CS01355. The documents and letters and copies provided ar listed below. The above mention copies, wer mistakenly and negligently not provide in the above mention petition, The above mention is the cause of this appeal. They are listed below and on documents dated. October 4, 2000 and November 1, 200.

A.

October 4, 2000 the petition to vacate the arbitration award and for rehearing.

1. January 1, 1977 contract between Kaiser and the U.S. Civil Service Commission
2. December , 1990 Moffitt letter Davenport
3. December 10, 1990 Davenport letter Moffitt
4. November 3, 1997 Wiley letter Wilburn
5. December 19, 1997 Wilburn letter Roman
6. July 26, 2000 Fraudulent Act.
7. April 3, 2000 Arbitrator's Award. RE: comments on defers and the false information provided by Kaiser.
8. March 6, 1992 Dr. Ernest Johnson [Expert Witness], recorded meeting, and (2) tapes recorded tapes also provided.
9. October 15, 1996 Dro. Ernest Johnson [Expert Witness] transcript of interview.
10. August 29, 2000 Judge Phillips and the Arbitration Panels ruling on motion to dismiss.

11. August 19, 2000 Table of Contents.
12. August 7, 2000 Roman letters Wilburn
13. August 10, 2000 Roman letter Wilburn. RE: Summary Judgment.
14. September 7, 2000 Roman to Wilburn RE: Notice to Appear.
15. July 12, 2000 Dr. Ernest Johnson [Expert Witness] opinion.
16. July 26, 2000 during the motion to dismiss Judge Phillips ordered Curtis R. Wilburn [Plaintiff and Appellant], to provide a complete set of documents and letters (41) table of contents. To each member of the Arbitration Panel and Ms. Judith B. Anderson.
17. July 29, 2000 Table of Contents, provide provided as ordered by Judge Phillips

B. November 1, 2000 Memorandum of Points and authorities in support of petitioners petition to vacate arbitration award and for rehearing

1. March 1, 1990 Dr. Laurence Ariyasu's operative notes:

C. March 6, 1992 Dr. Ernest Johnson (Expert Witness] recorded meeting Listed below are Dr. Ernest Johnson's opinion of the surgical procedure of Kaisers Dr. Laurence Ariyasu on Curtis R. Wilburn [Plaintif and Appellant]. According to the January 13, 1993 depisition of Dr. Laurence Ariyasu and the May 8, 1991 deposition of Curtis R. Wilburn.

Page 1. I met Wilburn in December 1989. Wilburn had myringotomy tubes in both ears

Page 2. States: That informed tape dectomy is not a minor procedure and it is incumbant on a surgeon to state in writing.

Page 3. The last paragraph and the last sentence: It was inappropriate to do this type of surgery with tubes in place.

Page 4. Third paragraph, states: that the tubes were inplace at the time of surgery, now that is bad I think that is below the standard of care and affording the patient a greater chance of complication. Wilburn's hearing must have been

improved and Dr. Ariyasu talked Wilburn into the operation.

Page . Middle paragraph, state: that you should not do surgery. We would never do surgery on an open middle ear. Thataffords a risk of total hearing loss and infection and meningitis. The last sentence on page 6. I think that is clearly contraindiction to doing surgery.

Page 7. Pargraph 6 states: I think what the operative notes is a bland operative note. Doing such exactly what you should do he opens the ear and finds a congential dehinscence of the facial.

Page 8. Paragraphs 1,3, 5, 6, 11 and 13. It has nothing to do with anything and it is a common congential defect, but from what was stated in the operative note, he just looked at it, and he saw the facial nerve compresses the superstructure. No further surgery was required. But he got quite busy during the surgery, didn't he? Obviously manipulated the ossicular chain sufficiently to traumatize the inner ear and so he

actually did much more than what was stated in the operative note. Because if all you did was look at the ear, I cannot imagine you get dizzy or a dead ear from just looking, so he manipulated that significantly. The nerve is worse, but more important for him is his vestibular change and he shows that he as got a left unilateral weakness which is surely secondary to Labyrinthitis and trauma to the inner ear. Now you have got to put some significant pressure on the inner ear to get that, just looking at it, he must have taken the inner ear bone and actually manipulated it, which is okay to do, you do that normally when you do a Stapedectomy.

Page 9. Paragraph 5. Wilburn had Vertigo during the procedure, which was quite severe and ends up with a marked unilateral weakness obviously he did more than that, because you don't get that with just looking at the inner, which has resulted in a permanent Labyrinthine Dysfunction.

Page 9. Paragraph 7. It can't be corrected there is nothing you can

do for that. It is essentially a nonfunctional Labyrinth which gives him the unsteadiness and Vertigo.

D. October 16, 1996 Dr. Ernest Johnson [Expert witness] transcript of interview. Listed below: Are Dr. Ernest Johnsons opinion of the surgical procedure of Kaisers Dr.

Laurence Ariyasu, on Curtis R. Wilburn [plaintiff and appellant]. According to the January 13, 1993., deposition of Dr. Laurence Ariyasu. And the May 8, 1991 deposition of Curtis R. Wilburn.

Page 1. A summary is that the patient Wilburn had a mixed hearing loss which means he had a mild nerve loss as well as the conductive hearing loss that was evaluated and initially treated with Tymponotomy tubes.

Page 2. The reason his Vertigo and the steadiness, was the lack of function of the inner ear. The inner ear was such that, he couldn't work in his usual occupation. With recurring episodes of true Vertigo.

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Page 3 and 4, The M.R.I. and CT scan tells us that there was enough trauma to the inner ear to cause the change to the inner ear, that can't be done without significant amount of manipulation of the inner and such traumatization of the inner in that type of surgery, would have been below the standard of care.

Page 5. Any time you do an operation on the ear, you can have potential hearing loss, and but. If you see a pathology that you can't correct, and you don't anything to it, you should not have any trauma to the inner ear, in that there was trauma.

It suggests that he did do some significant manipulation of the inner ear, so it would seem that he did more manipulation than would have been adviseable.

Page 6. Dr. Ernest Johnson has been practicing medicine in this field since 1957.

E. May 8, 1991 Curtis R. Wilburns deposition. States that:

Page 35. Line 20, and 21. Dr. Laurence Ariyasu. Said that he could bring the

left ear up to the equivalent to the right ear.

Page 48, line 26, A simple operation.

Page 52. Line 10 and 11. Dr. Laurence Ariyasu's recommendation.

Page 59. Line 16, thru 26. and page 60, line 1 thru 19, Wilburns description of the surgery and Vertigo.

Page 69. Line 5, thru 11. Dr. Laurence Ariyasu. Never mentioned that my hearing could be worse.

Page 70. Line 13, thru 26 felt pain.

Page 72. Line 16, thru 26, and page 73, line 1, thru 26. Splintering and cracking the bone, trying to pull apart, and then shaking uncontrollable.

Page 74. Line 1, thru 8. I felt cracking.

Page 75. Line 1 thru 7. The twisting was causing the cracking and the splintering.

Page 77. Line 23, thru 26. I thought that I was going to die right then and there.

Page 78. Line 1, thru 26 The anesthesiologist said stop!

I. ARGUMENT

I Curtis R. Wilburn [plaintiff and appellant], respectfully request that the documents and letter that are listed below be considered as:

Evident mistake, and improper form.

1. January 1, 1977 contract, article III, section 3.5 (A) which states: unless determined by a court or competent jurisdiction to have been fraudulent, or capricious, or arbitrary. Or so grossly erroneous as to necessarily imply bad faith, or supported by substan- evidence.
2. November 3, 1997 Kaiser provided false information. Which misrepresentation, fraudulent, and grossly erroneous as to necessarily imply bad faith, which is a direct violation of the January 1, 1997 contract.
3. April 3, 2000. Arbitration ruling in favor of Attorney John J. Roman, againt Curtis Wilburn. The Sacramento Superior and Municipal courts. Arbitration unit, case no. 98AS05525. The Honorable Judge Benjamin Diaz states: In the letter dated November 3, 1997 handwritten letter, that Kaiser did provide Curtis Wilburn, with false information and under the

circumstances presented at this hearing. It does appear that there may have an issue of implied waiver of the five year statute. Which should have been litigated in front of Judge Lloyd Phillips.

4. December 5, 1990 Moffitt letter Davenport. Re: assume you have no objection to deferring.
5. December 10, 1990 Davenport letter Moffitt. Re: We wish to defer for the time being.
6. May 14, 1992 Faires letter Roman. Re: Extension of time.
7. July 21, 1992 Roman letter Faires. Re: Your request for additional time.
8. October 3, 1994. Faires Letter Roman. Re: Agree to defer this procedural step.
9. November 14, 199. Faires letter Roman. Re: I responded since then! Note: Faires admits to not responding.
10. February 7, 1991 Faires letter Davenport. Re: Has an agreement to defer.

II. ARGUMENT

I Curtis R. Wilburn [Plaintiff and Appellant] respectfully requests the

document and letters listed below, be considered: Improper form, evident mistake, infractions, and infringements.

July 26, 2000 The motion to Dismiss. Time: 1:30 p.m. Place: Law Office of Minder and Muro., Location: 2151 River Plaza Drive, No. 290. Sacramento, Ca 95833. The Arbitration Panel members are the Honorable Judge Lloyd Phillips, and Thomas G. Minder, and David Abbott, and also attended was Kasiser's legal representative Ms. Judith B. Anderson. During this motion to dismiss, Judge Lloyd Phillips, ordered Curtis R. Wilburn [Plaintiff and Appellant] to provide a complet set of document and letters, which is the table of contents, which contais a total of (41) document and letters, dated: July 29, 2000.

August 19, 2000 at the continuance hearing for the motion to dismiss.

1. Curtis R. Wilburn [Plaintiff and Appellant], on July 12, 2000 in the office of Arbitrator David Abbott, did advise and informed Attorney David Abbott, that Attorney John J. Roman, was dismissed as my legal counsel from representing Curtis Wilburn, in this case of Wilburn vs.

Kaiser. And adviced arbitrator David Abbott, that Attorney John was dismissed on December 1997, and also that, I am afraid and fear for my life and bodily ham, from Attorney John J. Roman.

However the dismissed Attorney John J. Roman did appear at the August 19, 2000 continuance hearing for the motion to dismiss. As per mentioned in the October 4, 2000 petition to vacate arbitration award and for rehearing, Dated: November 17, 2000. Time: 9:00 a.m. in Dept. 53., the above mentioned was an uneasy event.

2. The full arbitration panel and Ms. Judith B. Anderson, even after her objections, to the Honorable Judge Lloyd Phillips request for Curtis R. Wilburn, to get the tapes out of his car, and bring it for the Arbitration Panel, and Ms. Judity B. Anderson to listen to these are the tapes of Curtis R. Wilburns [Expert Witness] Dr. Ernest Johnson. In and for the case of Wilburn vs. Kaiser. All of the above and Ms. Anderson, did listen to the tapes and did read the transcript. After which Curtis R. Wilburn Plaintiff and Appellant, did ask the Honorable Judge Lloyd Phillips if by the full Arbitration

Panel and Ms. Judith B. Anderson, listening to the tapes and reading the transcript of the expert witness of Curtis R. Wilburn. My question was did this help or hurt Curtis Wilburn in his case of Wilburn vs. Kaiser?

The Honorable Judge Lloyd Phillips answer is I think it would be a great help to your case, but it will never get there to be used!

ARBITRATION RULING AND APPEAL

August 29, 2000 Arbitrator's ruling on motion to dismissed to Kaiser [Defendants] after which Curtis R. Wilburn [Plaintiff and Appellant] by telecommunication with Ms. Maureen Newcomer, and Ms. Judith Anderson and did both Defendants that Plaintiff will seek an appeal. Now when Curtis R. Wilburn Plaintiff and Appellant was talking with Ms. Judity B. Anderson, she asked why are you making an appeal? We have fixed it, so that you can get Attorney John J. roman! What more do you want? Curtis R. Wilburn answered by saying compensation for 15.2 years of lost wages, pain and suffering and punitive damages, and mental distress.

KAISER CAN / DID FIX THE CASE

Apparently, Kaiser can and did fix it so that Curtis R. Wilburn Plaintiff, could win in the superior court against Attorney John J. Roman case of Wilburn vs. Roman. Case No 98AS05525, filed November 2, 1998 the compliant for damages for professional negligence, breach of fiduary duty and fraud. Note: The documents will show that Attorney Roman, had already won the case.

1. April 3, 2000 Arbitration award
2. August 3, 2000 Motion for summary adjudication of punitive damage.
3. September 13, 2000 the settlement conference
4. September 18, 2000 settlement memorandum
5. October 11, 2000 conditional settlement agreement.

UNEASY EVENT

November 17, 2000 Tentative ruling, petitioners petition to vacate the Arbitration award and for rehearing the petition is denied.

Kaiser representative Ms. Judith Anderson was present. After the hearing Curtis wilburn [Plaintiff and Appellant] in court stood and asked the Honorable Judge John R. Lewis.

If Plaintiff would or could receive a copy of the tentative rulling or court ruling? The judge said that I would be provided a copy! Now Ms. Judith Anderson was standing next to Curtis R. Wilburn with papers in her hand and she said that, I must sign this papers, which I did sign in Red Ink, I have not as of January 8, 2001 received a copy.

CONCLUSION

I CURTIS R. Wilburn [Plaintiff and Appellant], respectfully request that, the amended notice of appeal dated and filed January 8, 2001 be considered and based on imperfect form, infringements, infractions, and fraud.

The November 3, 1997 Wiley letter Wilburn according to Superior Court Judge, the Honorable Judge Benjamin Diaz states that: Kaiser did provide Wilburn with false

information and under the circumstances presented at this hearing. It does appear that there may have been an issue of implied waiver, of the five year statute, which should have been litigated in front of Judge Lloyd Phillips.

Plaintiff Respectfully requests that theletters requesting deferring of Arbritrator be considered, the letters above in the in page ii and listed below respectfully consitute an issue of the implied waiver of the five year statue of limitations.

4.December , 1990 Moffitt letter Davenport

5.December 10, 1990 Davenport letter Moffitt

8.October 3, 1994 Faires Letter Roman.

10. February 7, 1991 Faires letter Davenport.

The letters listed below be considered as: imperfect form.

6.May 14, 1992 Faires letter Roman.

9. November 14, 1995 Faires letter Roman. Faires admits to not responding. Plaintiff Respectfull

requests that, the Superior Court of Sacramento Arbitration Unit, Case No. 98AS05525 The Honorable Judge Benjamin Diaz presiding requesting that the above mentioned court be considered a (court of competent jursisdiction) and conforms to the January 1, 1977 contract Article III Section 3.5

(A) Page 19. This is the exact same contract that Kaiser [Defendant], has so graciously used for the five-year statute of limitations. Plaintiff respectfully request to be permitted to use the exact same contract as Kaiser [Defendant], and now prays that the above documents and letter, constitute legal, conizable grounds for setting aside the Arbitrator's decision, and for vacating the tentative ruling and curt ruling.

Respectfully submitted

Dated: January, 8, 2001

Curtis R. Wilburn
Plaintiff and Appellant
In Pro Per